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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 509

THE UNITED STATES OF AMERICA, APPELLANT

vs.

FRANCISCO UNZEUTA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

FILED DECEMBER 9, 1929

(34640)

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[Caption omitted.]

3 In United States District Court, District of Nebraska

Indictment

Filed Sept. 5, 1929

In the District Court of the United States, within and for the Chadron division of the District of Nebraska, in the Eighth Judicial Circuit.

The grand jurors of the United States of America, drawn from the territory comprising the Omaha, Norfolk, Chadron, Grand Island, and North Platte divisions of the District of Nebraska, and sitting in the Omaha division of said district in the term beginning April 1, 1929 being first duly empanelled, sworn, and charged by said court to inquire within and for said divisions, upon their oaths do present and say:

That by Executive orders of the President of the United States of America of November 14, 1876, June 28, 1879, and November 4, 1879, there were reserved from the public lands of the United States of America for the exclusive use of said United States of America for a military reservation at Fort Robinson (formerly Camp Robinson), in the State of Nebraska, three contiguous tracts of land aggregating in area about thirty-six square miles; that all said land so reserved for said Fort Robinson Military Reservation lies within the geographical limits of the counties of Dawes and Sioux in the State of Nebraska and within the Chadron division of the District of Nebraska and within the jurisdiction of this court; that all said lands so reserved for the exclusive use of said United States of America for said Fort Robinson Military Reservation is now, and ever since the dates of said Executive orders had been, continuously owned and occupied and used by said United States of America as a military reservation; that said Fort Robinson Military Reservation is now, and at all times since the dates of said Executive orders reserving said lands for a military reservation as above set forth has been, under the exclusive jurisdiction of said United States of America.

That by acts of the legislature of the State of Nebraska, approved March 29, 1887, and March 29, 1889, the State of Nebraska ceded to said United States of America whatever jurisdiction said State of Nebraska may or might have had over said Fort Robinson Military Reservation.

4 And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that at about 10 o'clock on the night of July 24, 1929, while the defendant, Francisco Unreuta, was riding on a freight car in a freight train being operated upon and over the railroad tracks of the Chicago and Northwestern Railway Company within and upon said Fort Robinson Military Reser-

vation and at a point on said Fort Robinson Military Reservation about one mile southwest of the Fort Robinson railway station located on said Fort Robinson Military Reservation, said defendant, Francisco Unzeuta, then and there being within the Chadron division of the District of Nebraska and within the jurisdiction of this court, did then and there, with premeditation and malice aforethought, unlawfully, wilfully, deliberately, maliciously, and feloniously kill one Omer Robertson (who was riding on the same freight car as said defendant, Francisco Unzeuta) by shooting from a 38-caliber revolver, had and held by said defendant, Francisco Unzeuta, two bullets into the body of said Omer Robertson; that said Omer Robertson then and there on said 24th day of July, 1929, on said Fort Robinson Military Reservation, died as a result of said gunshot wounds inflicted upon him, the said Omer Robertson, by said defendant, Francisco Unzeuta, as hereinbefore set forth; that by killing said Omer Robertson with premeditation and malice aforethought on and within the limits of said Fort Robinson Military Reservation, and in the manner hereinbefore set forth, said defendant, Francisco Unzeuta, committed murder in the first degree on said Fort Robinson Military Reservation, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

EDSON SMITH,
Assistant United States Attorney
for the District of Nebraska.

5 [Indorsed: No. 6062. 242 Cr. United States District Court, District of Nebraska, Chadron Division.]

7 In United States District Court, District of Nebraska, Chadron Division

UNITED STATES OF AMERICA v. FRANCISCO UNZUETA, DEFENDANT

Plea to jurisdiction

Filed Sept. 10, 1929

And now comes defendant, whose correct name is Francisco Unzueta, and in his own proper person, having heard the said indictment read, says that the said court here ought not to take cognizance of the trespass and other crime sought to be charged therein in said indictment, because, protesting that he is not guilty of the same or any misdemeanor, nevertheless the said Francisco Unzueta says:

It is not true that ever an act of Congress reserved the lands or any public lands in Sioux County or Dawes County, Nebraska, within this division for purposes or uses as Camp Robinson, nor Fort Red Cloud, nor Fort Robinson; and by the law of the land, no act of the Executive department may consecrate or set aside or

designate of public lands for purposes as a fort, but only an act of the Congress might do so; and that no such act nor any act nor Executive order did designate any portion of section 26 or section 25, township 33, north of range 53, whereat was committed the supposed and alleged assault sought to be charged in the said indictment; and this defendant further says that the railroad whereon it is alleged the said misdemeanor and crime and assault were committed was, at the alleged date, and ever has been since the erection of said railroad across sections 13 and 24 and 25 and 26 in said township and range aforesaid, in the year 1886, by Fremont, Elkhorn, and Missouri Valley Railroad Company, a Nebraska corporation, and none other, a post road of the State of Nebraska and highway for the use of said State of Nebraska and the carriage of mails between the county seats of the named counties; that by the law of the land the same was and yet is an agency and public utility of
8 the said State and not of the United States, and which is wholly within the jurisdiction of the State of Nebraska and might not be surrendered by the said State of Nebraska unto any sovereignty to the detriment of and deprivation of defendant of his constitutional rights, that is to say:

The defendant was seized and arrested by the sheriff of Sioux County, Nebraska, in which said county it is claimed to be the fact that the fatal shot alleged in the indictment was fired and at a place therein where the said Sioux County, Nebraska, and its courts of competent jurisdiction have exclusive or concurrent jurisdiction with the courts of the United States for the prosecution and punishment of the crime of murder; and said sheriff of the State of Nebraska detained this defendant in jail; and under direction of county attorney of county of Sioux and State of Nebraska, and under promises made to defendant that he, said defendant, and his fellow Mexicans, arrested at the same time and place and under this same charge of murder of Omer Robertson, would improve his situation and would be dealt with more gently if defendant would make a statement of the facts, the said State of Nebraska procured and induced from defendant and his associates and friends statements made through and to an interpreter produced by said State of Nebraska; and that afterwards the said State of Nebraska and its sheriff and its county attorney did release and surrender unto the United States of America and its officials of this court the person and custody of defendant, which was and is without the consent or procurement, and is against the will of defendant.

And defendant says that by the laws of the State of Nebraska the punishment for one convicted of crime of murder in the first degree shall be by the humane and painless act of electrocution in the State penitentiary; that by the laws of the United States of America the punishment for that grade of crime is by the painful, cruel, and unusual act of hanging; that the surrender of defendant unto the United States authorities by the sheriff and county attorney

of Sioux County, Nebraska, is an unlawful and unconstitu-
9 tional deprivation of defendant of all and every constitutional right of prosecution, trial, and punishment, which are assured defendant by treaties and constitutions of State and of the United States, of all of which statutes and treaties and constitutional provisions and the want of any enactment of the Congress to create any fort or camp at the county of Sioux, in the State of Nebraska, this court has judicial knowledge, and this defendant is ready to verify; wherefore, he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

But reserving unto himself all exceptions and all manner of rights under said treaty and constitutions and laws and privileges herein set out by himself and such as shall be set out herein at length, if the Honorable James C. Kinsler, Esq., who prosecutes in the name and behalf of the United States of America as United States attorney for the district of Nebraska, shall deny this plea and put himself upon the country in that behalf, then this Francisco Unzueta for himself and in his own proper person doth allege and declare the fact to be: The said named defendant was born in the city of Canatlan and State of Durango and Republic of Mexico, but of Castilian parentage and descent, and he is and has been since his birth in the year 1904 at said city a citizen, resident, and inhabitant of said city and State; and defendant, by compliance with the laws of United States and the treaty between the United States of America and the Republic of Mexico, was and is lawfully within the United States as a farm laborer, which occupation he had been continuously and was peacefully and industriously pursuing in the sugar-beet growing regions of the States of South Dakota and of Montana, and this defendant was, on July 24, 1929, lawfully in interstate commerce, transferring himself via the post road, described in the foregoing paragraph hereof, from the town of Nisland, in the State of South Dakota, unto the city of Casper, in the State of
Wyoming, where is the employment agency having relations
10 with this defendant in capacity of laborer and employer in beet-raising farming now and heretofore.

And defendant says that by virtue of the treaty above mentioned, made for his enjoyment and protection as well as of all other naturals of Republic of Mexico, and by virtue of the most-favored-nation's clause in said treaty, this defendant is entitled to and he requests that his plea to the jurisdiction of this court shall be tried to a jury composed of equal number of citizens of Mexico now domiciled in the State of Nebraska and of citizens of this Government, State, and division of this court.

FRANCISCO UNZEUTA, *Defendant.*

11 [*Duly sworn to by Francisco Unzeuta; jurat omitted in printing.*]

[File indorsement omitted.]

12 In United States District Court

UNITED STATES OF AMERICA, PLAINTIFF
vs.
FRANCISCO UNZEUTA, DEFENDANT
Number 242, Criminal

Judgment

Filed Nov. 5, 1929

This cause having heretofore been submitted to the court upon the defendant's plea to the jurisdiction, the court, upon full consideration of the said plea and of the indictment herein returned, finds that this court is without jurisdiction over the alleged offense set forth in the indictment to which said plea is directed.

The court finds that the United States of America has not exclusive jurisdiction over the strip of land comprising the right of way of the Chicago and Northwestern Railway Company through the Fort Robinson Military Reservation in the State of Nebraska, nor upon said railway company's train of cars situate thereon whereon the homicide charged in said indictment is alleged to have been committed.

The court finds that the granting of said right of way to the said railway company was an abandonment by the United States of its use of said right of way for military purposes, and thereby the United States ceased to have exclusive jurisdiction over the same, to all of which findings the plaintiff is allowed an exception.

It is therefore ordered by the court that the said plea to the jurisdiction of this court be, and the same is hereby, sustained and that the defendant, Francisco Unzeuta, be, and he is hereby, discharged and this action dismissed, and the United States marshal is directed to release him from custody and also to release Manuel Cardones and Eriberts Contreras, who are held in custody as witnesses for the Government, to which the plaintiff is allowed an exception.

But the United States attorney for the district of Nebraska here gives notice that the United States intends to perfect an ap-
13 peal from this judgment of the court and asks that the defendant be not discharged until such appeal may be perfected.

It is therefore ordered by the court that this judgment be not given effect so far as it relates to the discharge from custody of the said defendant and the witnesses above named until thirty days from and after the date hereof, but that upon the perfecting of said appeal the said defendant and the said witnesses be and they are hereby granted the privilege of entering into their own recognizance to appear in court in answer to the said indictment so returned against them in the event that the appellate court reverses this judgment.

Dated this 4th day of November, 1929.

J. W. WOODROUGH,
United States District Judge.

[File indorsement omitted.]

14 In United States District Court

[Title omitted.]

Opinion on plea to jurisdiction

Filed Nov. 5, 1929

By the court.

WOODROUGH, District Judge:

The defendant is indicted for a murder charged to have been committed on a freight car in a freight train being operated upon and over the railroad tracks of the C. & N. W. Ry Co. within and upon the Fort Robinson Military Reservation within the Chadron division of the district of Nebraska.

By plea to the jurisdiction the defendant, among other things, presents that the place of the alleged murder specified in the indictment was not "a place within the exclusive jurisdiction of the United States." The status of Fort Robinson as a military reservation within the exclusive jurisdiction of the United States has been settled for this court and is not now open to question. This court has tried a number of criminal cases where the acts were committed upon the reservation and has sustained the jurisdiction because the reservation is and has long been within the exclusive jurisdiction of the United States. None of these cases are reported, but Judge Shiras reviews the history of the reservation and establishes the conclusion for the Federal court in the published opinion in re Ladd, 74 Fed. 31, and the fact that it is a military reservation under the exclusive jurisdiction of the United States is confirmed for State authorities by the Supreme Court of Nebraska in Anderson vs. C. & N. W. Ry. Co. 102 Neb. 578.

15 But conceding the exclusive jurisdiction of the United States over the reservation, the question remains whether the trains being operated upon the railroad right of way and the strip of right-of-way land which bisects the reservation are also places within such exclusive Federal jurisdiction.

It was settled by the Supreme Court in Fort Leavenworth R. Co. vs. Lowe, 114 U. S. 525, and C. R. I. & P. Ry. Co. vs. McGlinn, 114 U. S. 542, as to the Fort Leavenworth Reservation in Kansas that the Federal jurisdiction over the reservation rests upon a different foundation and has different scope from the Federal jurisdiction over the seat of Government in Washington and those places within the States which the Federal Government has purchased for the purposes and in the manner specified in article 1, section 8, of the Constitution.

The lands upon which the Fort Robinson Military Reservation is situate were public lands and belonged to the United States when Nebraska was admitted to the Union, and by the act of admission the lands came under the jurisdiction of the State. When the Federal authorities set them aside for its military purposes, the State made

cession of its jurisdiction over the lands to the United States. The two legislative enactments are set out and considered by Judge Siras in his opinion in the Ladd case, supra. The act of cession and the acceptance thereof by the United States constituted a convention and agreement, and the Federal jurisdiction rests upon that and is limited accordingly. In those cases where the Government purchases lands with the consent of the State in accordance with, and for the purposes specified in, the constitutional provision the Federal jurisdiction is absolute, but, as the military reservation of Fort Robinson was not so acquired, the language of the Supreme Court in the Lowe case, supra, is applicable. The court says:

"The military reservation of Fort Leavenworth was not * * * acquired by purchase with the consent of Kansas. And her cession is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post."

The court also says:

"It is for the protection and interests of the States, their
16 people and property, as well as for the protection of the people generally of the United States, that forts, arsenals and other buildings for public uses are constituted within the States. As instrumentalities for the execution of the powers of the general Government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes, and if for their more effective use a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State. Such cession is really as much for the benefit of the States as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the State."

Again in the McGlinn case, supra, the Supreme Court further said on the same subject:

"It is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the general Government in the execution of its powers, the use of the places being, in fact, as much for the people of the States as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes.

And further in the same case:

"The Government of the State of Kansas extended over the reservation and its legislation was operative therein, except so far as the use of the land as an instrumentality of the general Government may have excepted it from such legislation."

In the case of Benson vs. U. S., 146 U. S. 325, the court held that a murder committed within the limits of the Fort Leavenworth Military Reservation was cognizable in the Federal court although done upon a part thereof let out temporarily for farming. The court said:

"It is contended by appellant's counsel that * * * jurisdiction passed to the general Government only over such portions of the reserve as are actually used for military purposes and that the particular part of the reserve on which the crime charged was committed was used for farming purposes. But in matters of that kind the courts follow the action of the political department of the Government. The entire tract has been legally reserved for military purposes. U. S. vs. Stone, 69 U. S., 2 Wall. 525. The character and purposes of its occupation having been officially and legally established by that branch of the Government which has control over such matters, it is not open to the courts on a question of jurisdiction to inquire the actual uses to which any portion of the
17 reserve is temporarily put. There was therefore jurisdiction in the Circuit Court."

These cases are reviewed by the Supreme Court in the very recent case of Arlington Hotel vs. Fant, 278 U. S. 459, and the principles announced in the cases are adhered to and applied to the facts there presented. It appeared that a hotel was being operated on land leased by the United States for the purpose within Hot Springs National Park, and the question was whether it was within the exclusive jurisdiction of the United States. The court said:

"We think that the history of this Hot Springs National Park, as shown by the legislation leading to its establishment and circumstances which the court may judicially notice, is such that the small tract whose jurisdiction is here in question (i. e., the hotel property) may be brought within the principal of the Low case and other cases already cited."

The court held that all the forty-four springs from which the healing waters came were properly brought within the exclusive national jurisdiction, and that police protection, preservation, and control over them were properly with the National Government, saying further:

"Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accom'odation on the little park surrounding the hospital and the springs. Benson v. United States, supra, and Williams v. Arlington Hotel Co., 22 F. (2d) 669."

The special act of Congress granted the Chicago & Northwestern Railroad Company a right of way over and across the lands within the Fort Robinson Reservation and a perpetual easement for the purpose of operating a railroad on said lands. The corporation accepted the grant, took possession of the land, and has continuously operated its main line of railroad over it ever since. The action of Congress in turning the land over to the railroad company for railroad purposes was obviously an abandonment of any Fed-

eral use of the land for military purposes. The relinquishment of the use and possession of the land by the Government was permanent, and there is nothing in the special act to indicate any intention other than that the corporation should permanently use the land granted as railroads universally use their right-of-way
18 lands for their own profit and public service as carriers. In the case of Utah and Northern Railway vs. Fisher, 116 U. S. 30, the Supreme Court considered the effect of a similar grant of railroad right of way across the Fort Hill Indian Reservation in the Territory of Idaho and said:

"By force of the cession thus made (that is, the acts of Congress granting right of way for the construction and operation of the railroad) the land upon which the railroad and other property of the railroad are situated was, so far as necessary for the construction and working of the road, withdrawn from the reservation. The road and the property thereupon became subject to the laws of the Territory relating to railroads as if the reservation had never existed."

In that case the parties stipulated that the railroad and its property were "upon the reservation," but the court said (p. 33) that the stipulation had to be read "with reference to the legislation of Congress and therefore as only establishing that the road and property are within the exterior boundaries of the reservation." So in this case the railroad is in no proper sense upon the Fort Robinson Reservation. It is merely within the exterior boundaries thereof. In fact, it bisects the reservation. The court decided in the case referred to that the power to tax the railroad property (an attribute of sovereignty) was in the Territory.

There is here no question of a temporary use of a part of the reservation such as might be permitted or sanctioned in the discretion of the commanding officer on the reservation as considered in the Benton case, supra. The abandonment of military for civil and of governmental for railroad corporation purposes was completed by the special act of Congress and possession taken and maintained by the railroad company. Comparison of the dates shows that the act of Congress relinquishing the railroad right of way was passed before the first act of cession by the State legislature. The fact is not controlling. When Congress made the grant to the railroad company, and the railroad company accepted it and acted upon it by taking possession, the Government's control and jurisdiction over the strip of land ceased. It never thereafter undertook to regulate or control the railroad company in the operation of tne road except through the interstate commerce regulations ap-
19 plicable to all roads). The ruling made as to fences considered by the Nebraska Supreme Court in the Anderson case, supra, were regulations of the military reservation and not of the railroad.

In the case of Clairmont vs. U. S., 225 U. S. 551, a question arose upon a prosecution for introducing liquor into the Indian country.

The accused had liquor on a train operated on the right of way of the Northern Pacific Railway passing through the Flathead Indian Reservation in Montana. The Indian reservation was Indian country and under Federal jurisdiction for the purpose of carrying out Federal obligations toward the Indians resident there. The inconvenience of splitting Federal and State jurisdiction in criminal cases was apparent and doubtless was the occasion for pursuing the litigation to the Supreme Court. The prosecution admitted the usual test of Indian country was extinguishment of Indian titles and that the titles were extinguished over the railroad right of way. It relied upon the difficulty of Federal protection of its Indians against liquor. The court held that the Indian land title had been extinguished as to the lands constituting the railroad right of way, and therefore the railroad right of way ceased to be Indian country and became subject to the laws and jurisdiction of the State. The facts are not identical with those here under consideration, but the conclusion demonstrates that the mere difficulty of enforcing State authority over a strip of land extending through an area under Federal jurisdiction is not controlling.

While the railroad company here is permanently occupying and using its right of way for the operation of its railroad, it can not be said that the Government is exclusively occupying and using the land for any governmental purpose. The decisions of the Supreme Court make the continued occupation and user by the Government for a governmental purpose the test of sovereignty. There is an inconvenience in having an area of country under Federal sovereignty and a strip of land running through it under State sovereignty. But the Federal power must not be extended on account of any supposed convenience. As the Federal Government was not in occupation or control of the right of way and tracks of the railroad company or the trains operated by the railroad company upon its own right of way, the place where the crime is charged to have been committed was not within the territorial jurisdiction of this court.

The plea to the jurisdiction of the court ought, therefore, to be sustained. The question, however, is of importance. The order dismissing the case for want of jurisdiction and discharging the prisoner will not be entered until time is accorded the Government to review the decision if it shall be so advised.

[File indorsement omitted.]

In United States District Court

[Title omitted.]

Notice of appeal

Filed Dec. 3, 1929

The above-named defendant and his attorneys will take notice that the United States of America appeals, or will appeal within the

time provided by law to the Supreme Court of the United States, from the judgment of this court made and entered herein November 5, 1929, sustaining defendant's plea to the jurisdiction of this court and ordering that the defendant be discharged and this action be dismissed.

That said appeal is taken by the United States of America for the purpose of reviewing the proceedings had upon the hearing of defendant's said plea to the jurisdiction of this court and for the purpose of reviewing said judgment of this court sustaining said plea of the defendant to the jurisdiction of this court and for the purpose of having the indictment of the defendant returned by the grand jury reinstated and the defendant ordered by said Supreme Court of the United States to be placed on trial upon the charges set forth in said indictment.

Dated this 29th day of November, 1929.

UNITED STATES OF AMERICA,
By GEO. A. KEYSER,
Assistant United States Attorney
for the District of Nebraska.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 1st day of December, 1929, I received this notice of appeal, and on the 3rd day of December, 1929, I served the same upon the within-named Francisco Unzeuta and also on S. L. O'Brien, one of the attorneys of record for the said Francisco Unzeuta. Both served at Chadron, in Dawes County, State and District of Nebraska, by delivering to and leaving with each of them a copy thereof, with all the indorsements thereon.

D. H. CRONIN,
United States Marshal for the District of Nebraska,
By PARLEY HYDE,
Deputy United States Marshal.

[File indorsement omitted.]

22 In United States District Court

[Title omitted.]

Petition for appeal

Filed Dec. 3, 1929

Now comes the plaintiff and appellant, United States of America, by James C. Kinsler, United States attorney for the district of Nebraska, and plaintiff, conceiving itself aggrieved by the final order and judgment of this court made and entered November 5, 1929, in the above-entitled cause sustaining defendant's special plea in bar—that is to say, in sustaining defendant's plea to the jurisdiction of

this court, dismissing the indictment, and ordering the release of the defendant and the Government witnesses, Manuel Cardones and Eriberts Contreras, said final order and judgment being as follows:

"*Judgment of the court*

"This cause having heretofore been submitted to the court upon the defendant's plea to the jurisdiction, the court, upon full consideration of the said plea and of the indictment herein returned, finds that this court is without jurisdiction over the alleged offense set forth in the indictment to which said plea is directed.

"The court finds that the United States of America has not exclusive jurisdiction over the strip of land comprising the right of way of the Chicago and Northwestern Railway Company through the Fort Robinson Military Reservation in the State of Nebraska, nor upon said railway company's train of cars situate thereon whereon the homicide charged in said indictment is alleged to have been committed.

"The court finds that the granting of said right of way to the said railway company was an abandonment by the United States of its use of said right of way for military purposes, and thereby the United States ceased to have exclusive jurisdiction over the same, to all of which findings the plaintiff is allowed an exception.

"It is therefore ordered by the court that the said plea to the jurisdiction of this court be, and the same is hereby sustained and that the defendant, Francisco Unzeuta, be and he is hereby discharged and this action dismissed, and the United States marshal is directed to release him from custody and also to release Manuel Cardones and Eriberts Contreras, who are held in custody as witnesses for the Government, to which the plaintiff is allowed an exception.

23 "But the United States attorney for the District of Nebraska here gives notice that the United States intends to perfect an appeal from this judgment of the court and asks that the defendant be not discharged until such appeal may be perfected.

"It is therefore ordered by the court that this judgment be not given effect so far as it relates to the discharge from custody of the said defendant and the witnesses above named until thirty days from and after the date hereof, but that upon the perfecting of said appeal the said defendant and the said witnesses be, and they are hereby, granted the privilege of entering into their own recognizance to appear in court in answer to the said indictment so returned against them in the event that the appellate court reverses this judgment.

"Dated this 4th day of November, 1929.

"J. W. WOODROUGH,
"*United States District Judge.*"

does hereby appeal from said final order and judgment of this court to the Supreme Court of the United States for the reasons specified

in the assignments of error, which are filed herewith, and plaintiff prays that this appeal may be allowed and that a citation may be issued as provided by law, and that a transcript of the record, proceedings, and papers upon which said final order and judgment of this court was made, duly authenticated, may be sent to said Supreme Court of the United States.

Dated this 2nd day of December, 1929.

JAMES C. KINSLER,
United States Attorney,
Attorney for plaintiff and appellant.

[File indorsement omitted.]

24 In United States District Court

[Title omitted.]

Assignments of error

Filed Dec. 3, 1929

The United States of America, plaintiff and appellant, now comes with its petition for allowance of appeal and assigns the following errors of the trial court upon which plaintiff and appellant will rely in the prosecution of its appeal to the Supreme Court of the United States from the final order and judgment of the trial court made and entered herein November 5, 1929, namely:

1. The trial court erred in sustaining defendant's special plea in bar—that is, in sustaining defendant's plea to the jurisdiction of the trial court.

2. The trial court erred in dismissing the indictment which was returned against the defendant by United States grand jury at the April, 1929, term of the United States District Court for the district of Nebraska, Omaha division, and duly transmitted to the Chadron division of said United States District Court for the district of Nebraska, charging the defendant with first-degree murder committed on the Fort Robinson Military Reservation located in the district of Nebraska and within the jurisdiction of said United States District Court for the district of Nebraska, Chadron division.

3. The trial court erred in finding and holding "that this court is without jurisdiction over the alleged offense set forth in the indictment" to which defendant's plea to the jurisdiction of the trial court "is directed."

4. The trial court erred in finding and holding "that the United States of America has not exclusive jurisdiction over the strip of land comprising the right of way of the Chicago and
25 Northwestern Railway Company through the Fort Robinson Military Reservation, in the State of Nebraska, nor upon said railway company's train of cars situate thereon whereon the homi-

cide charged in said indictment is alleged to have been committed."

5. The trial court erred in finding and holding "that the granting of said right of way to the said railway company was an abandonment by the Unted States of its use of said right of way for military purposes, and thereby the United States ceased to have exclusive jurisdiction over the same."

6. The trial court erred in ordering and adjudging that defendant's plea to the jurisdiction of the trial court "be and the same is hereby sustained."

7. The trial court erred in ordering and adjudging "that the defendant, Francisco Unzeuta, be and he is hereby discharged and this action dismissed."

8. The trial court erred in ordering, adjudging, and directing "and the United States marshal is directed to release him (defendant) from custody."

9. The trial court erred in ordering, adjudging, and directing "and the United States marshal is directed * * * also to release Manuel Cardones and Eriberts Contreras, who are held in custody as witnesses for the Government."

All of which is respectfully submitted.

Dated this 2nd day of December, 1929.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff and Appellant.

[File indorsement omitted.]

26 In United States District Court

[Title omitted.]

Order allowing appeal

Filed Dec. 3, 1929

Upon reading the petition of the plaintiff and appellant, United States of America, dated December 2, 1929, for the allowance of an appeal to the Supreme Court of the United States, and on consideration of the assignments of error presented therewith, it is by the court hereby

Ordered that the appeal as prayed for be and it is hereby allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the Supreme Court of the United States, and it appearing that this appeal is taken by direction of a department of the Government of the United States—to wit—the Department of Justice, it is further

Ordered that said appeal shall operate as a supersedeas and that no bond, obligation, or security shall be required from the plaintiff

and appellant, United States of America, either to prosecute its said appeal or to answer in damages or costs.

Dated this 2nd day of December, 1929.

J. W. WOODROUGH,
United States District Judge
for the District of Nebraska.

[File indorsement omitted.]

27 [Citation in usual form showing service on Francisco Unzeuta filed Dec. 3, 1929, omitted in printing.]

28 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed Dec. 3, 1929

The clerk of said United States District Court for the district of Nebraska, Chadron division, is requested to immediately prepare and forthwith transmit to the Supreme Court of the United States at the City of Washington, in the District of Columbia, a transcript of the record in the above-entitled criminal action and include therein the following:

1. Report of the United States grand jury drawn from the territory comprising the Omaha, Norfolk, Chadron, Grand Island, and North Platte divisions of the district of Nebraska, and sitting in the Omaha division of the United States District Court for the district of Nebraska, at the April, 1929, term of said court and made September 5, 1929, that: "This day the grand jury returns in open court an indictment against Francisco Unzeuta, the defendant herein," etc.

2. Said indictment of the defendant returned by said United States grand jury at said April, 1929, term of said United States District Court for the district of Nebraska, Omaha division.

3. Certificate transferring indictment and case from the Omaha division to the Chadron division.

4. Defendant's special plea in bar—that is to say, defendant's plea to the jurisdiction of the trial court.

5. Final order and judgment of the trial court sustaining defendant's said special plea in bar—that is to say, defendant's plea to the jurisdiction of the trial court.

6. Opinion of the trial court or memorandum on plea to jurisdiction filed herein and giving the court's reasons for rendering said judgment.

7. Notice of appeal to the Supreme Court of the United States with proof of service.
8. Petition for allowance of appeal.
9. Assignments of error.
10. Order allowing appeal.
11. Citation with proof of service.
12. This præcipe for transcript of record and proof of service.
13. Clerk's certificate of transcript of record.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff and Appellant.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return, that on the 3rd day of Decem. 1929, I received this præcipe for transcript, and on the 3rd day of December, 1929, I served the same upon the within-named Francisco Unzeuta and also on S. L. O'Brien, one of the attorneys of record for the said Francisco Unzeuta. Both served at Chadron in Dawes County, State and district of Nebraska, by delivering to and leaving with each of them a copy thereof with all the indorsements thereon.

D. H. CRONIN,
United States Marshal for the District of Nebraska.
By PARLEY HYDE,
Deputy United States Marshal.

[File indorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Statement of points upon which appellant will rely and designation of parts of record to be printed

Filed Dec. 19, 1929

Statement

I

Appellant will rely upon the following point in the above-entitled cause:

1. That the court below erred in sustaining the plea to the jurisdiction and dismissing the pending indictment.

II

Omitting pages 1, 2, 5, and 6, the record as filed should be inted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

O. R. LUHRING,
Assistant Attorney General.
W. H. RAMSEY, *Attorney.*

[e indorsement omitted.]

dorsement on cover:] File No. 34,640. Nebraska, D. C., U. S. a No. 509. The United States of America, appellant, vs. Fran- o Unzeuta. Filed December 9, 1929. File No. 34,640.

O

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No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZEUTA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

STATEMENT OF JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 509

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZEUTA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis of this Court's jurisidction in the above-entitled cause.

A

STATUTORY PROVISIONS

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is found in the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C. Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

B

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment to be reviewed was entered November 5, 1929. (R. 13.) Petition for appeal was presented on December 2, 1929 (R. 23), and was allowed on the same day. (R. 26.)

C

NATURE OF THE CASE

The indictment charges defendant with committing the crime of murder in the first degree upon one Omer Robertson, upon a freight train on the tracks of the Chicago and Northwestern Railway Company within the Fort Robinson Military Reservation. (R. 3–4.) Defendant filed a "Plea to the jurisdiction," alleging that the place where it is alleged the offense was committed was wholly within the jurisdiction of the State of Nebraska. (R. 7–10.) The court sustained the plea, and ordered the action dismissed upon the ground that "the United States of America has not exclusive jurisdiction over the strip of land comprising the right of way of the Chicago and Northwestern Railway Company through the Fort Robinson Military Reservation in the State of Nebraska," and that the granting of the right of way by the United States to the railway company "was an abandonment by the United States of its use of said right of way for military purposes and thereby the

United States ceased to have exclusive jurisdiction over the same." (R. 12–13.)

D

CASES SUSTAINING JURISDICTION

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United States v. *Oppenheimer*, 242 U. S. 85.
United States v. *Thompson*, 251 U. S. 407.
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CHARLES E. HUGHES, Jr.,
Solicitor General.
O. R. LUHRING,
Assistant Attorney General.
W. H. RAMSEY,
Attorney.

DECEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILE COPY

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No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZEUTA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 509

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZÚETA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 6–10) is reported in 35 F. (2d) 750.

JURISDICTION

This case comes here under the fourth paragraph of the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and Section 238 of the Judicial Code as amended by the Act of February 13, 1925. That paragraph of the Criminal Appeals Act provides for a direct review by this Court of a decision or judgment of a District Court sustaining a special plea in bar, when the defendant has

not been put in jeopardy. The plea in this case was to the jurisdiction.

On January 20, 1930, this Court found that probable jurisdiction had been shown.

QUESTIONS PRESENTED

1. Did Congress by the Act of January 20, 1885, withdraw the land included in a right of way, granted by the Act to a Railroad, from the Fort Robinson Military Reservation so as to deprive the Government of jurisdiction over a murder committed on that right of way?

2. Did the cession of jurisdiction by the State of Nebraska give the United States exclusive criminal jurisdiction over all the territory within the limits of the Reservation, including the railroad's right of way?

STATUTES INVOLVED

Sec. 272, Criminal Code (U. S. C. Title 18, Sec. 451):

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Act of Congress approved January 20, 1885, c. 26, 23 Stat. 284:

> An act granting the right of way to the Fremont, Elk Horn and Missouri Valley Railroad Company across the Fort Robinson Military Reservation, in the State of Nebraska.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Fremont, Elk Horn and Missouri Valley Railroad Company, a corporation duly organized under the laws of the State of Nebraska, are hereby granted the right of way, one hundred feet in width, for their said railroad, across and through the Fort Robinson Military Reservation, located in said State of Nebraska, not to interfere with any buildings or improvements thereon, and the location thereof to be subject to the approval of the Secretary of War.

Act of Nebraska Legislature, approved March 29, 1887, Laws of Nebraska, 1887, p. 628:

> *Be it enacted by the Legislature of the State of Nebraska:*
>
> SECTION 1. That the jurisdiction of the state of Nebraska in and over the military reservations known as Fort Niobrara and Fort Robinson be and the same are hereby ceded to the United States.
>
> *Provided,* That the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy said military reservations.

SEC. 2. The said jurisdiction is ceded upon the express condition that the state of Nebraska shall retain concurrent jurisdiction with the United States in and over the said military reservations so far as that all civil process in all cases, and such criminal or other process may issue under the laws or authority of the state of Nebraska against any person or persons charged with crime or misdemeanors committed within said state, may be executed therein in the same way and manner as if such jurisdiction had not been ceded except so far as such process may affect the real and personal property of the United States;

Provided, That nothing in the foregoing act shall be construed so as to prevent the opening and keeping in repair public roads and highways across and over said reservations.

STATEMENT

The indictment charges that the defendant murdered one Robertson on July 24, 1929, and that the murder took place upon a freight car on the right of way of the Chicago & Northwestern Railway Company on the Fort Robinson Military Reservation in Nebraska. (R. 1–2.) The defendant filed a plea to the jurisdiction, alleging that the place where the alleged offense was committed—the railroad right of way—was wholly within the jurisdiction of the State of Nebraska and not within the Fort Robinson Military Reservation. (R. 2–4.)

The District Court sustained the plea and dismissed the action on the ground that the United States courts had no jurisdiction of an offense committed on this right of way. (R. 5.)

By the Treaty of Paris, ratified April 30, 1803, 8 Stat. 200, France ceded Louisiana to the United States. Louisiana included all of the land in question, and the cession vested both title and sovereignty in the United States.

By Act of April 19, 1864, c. 59, 13 Stat. 47, Congress authorized the inhabitants of the Territory of Nebraska to form a State government. The Act reserved no sovereignty over any public lands, but Section 4 (Third) provided that (p. 48)—

> all right and title to the unappropriated public lands lying within said territory * * * shall be and remain at the sole and entire disposition of the United States * * *.

The Act of February 9, 1867, c. 36, 14 Stat. 391, admitted Nebraska to the Union.

By Executive Order of November 14, 1876, the land included within the Fort Robinson Military Reservation, including this right of way, was reserved for such reservation.

By Act of January 20, 1885, c. 26, 23 Stat. 284 (p. 3, *supra*), Congress granted this right of way to the Fremont, Elk Horn and Missouri Valley Railroad Company.

By Act of March 29, 1887, Laws of Nebraska, 1887, p. 628 (pp. 3–4, *supra*), the Nebraska Legisla-

ture ceded jurisdiction over this reservation to the United States.

SPECIFICATION OF ERROR TO BE URGED

The trial court erred in sustaining defendant's plea to the jurisdiction of the trial court.

SUMMARY OF ARGUMENT

1. The Act of Congress granting a right of way to the railroad across Fort Robinson Military Reservation was not intended to affect the sovereignty or control of the United States over the land embraced in the right of way.

2. The cession by the State of Nebraska of exclusive jurisdiction over the Fort Robinson Military Reservation, to the United States, constituted a convention and agreement and the Federal jurisdiction rests upon that convention and agreement and is limited accordingly.

3. The interpretation of the cession by the State of Nebraska and by the War Department with respect to this right of way supports the conclusion that the cession of exclusive jurisdiction covers such right of way.

ARGUMENT

Examination of cases decided by this Court leads to the conclusion that exclusive jurisdiction of lands within a State may be, or may have been, acquired by the United States in any one of four ways:

(1) The United States may reserve jurisdiction, when authorizing the formation of a State, in the Enabling Act.

(2) The United States may without the consent of the State purchase or condemn land for a national purpose. In such case, such jurisdiction would attach as was needed to enable the United States to use the land for the purpose for which it had been purchased. If the purpose ceases, the jurisdiction of the Federal Government ceases.

(3) The United States may purchase land with the consent of the State, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

(4) The United States may acquire exclusive jurisdiction by a formal cession by the State, after the original purchase of the ownership of the land has been made.

The first three methods of acquisition are not of special interest in this case, except by way of contrast.

I

The land involved in the Fort Robinson Military Reservation was originally part of the unappropriated public land belonging to the United States, and the United States retained ownership of it after the admission of Nebraska into the Union in 1867. (See Act of April 19, 1864, p. 5, *supra.*) By Executive Order of November 14, 1876, the Fort Robinson Military Reservation was reserved out of such public lands.

Upon the creation of such Military Reservation, and prior to the cession of exclusive jurisdiction by the State of Nebraska, it would seem that the

United States had the right of exclusive control only with respect to the premises actually occupied by the military forces; and with respect to other portions of the Military Reservation not so actually occupied, the laws of the State of Nebraska would be in force so far as private persons were concerned. *Fort Leavenworth Railroad Co.* v. *Lowe,* 114 U. S. 525, 527; *Arlington Hotel* v. *Fant,* 278 U. S. 439, 451.

The effect, therefore, of the cession by the State of Nebraska of exclusive jurisdiction in 1887 was to extend the exclusive jurisdiction of the United States throughout the entire Military Reservation, except as otherwise provided in the Act of Cession.

II

Jurisdiction ceded to the United States by a State is complete for all purposes, except as limited by the terms of the cession.

As the court below has well said (R. 7):

> The act of cession and the acceptance thereof by the United States constituted a convention and agreement, and the Federal jurisdiction rests upon that and is limited accordingly.

This proposition is adequately supported by *Fort Leavenworth Railroad Co.* v. *Lowe, supra; Chicago & Pacific Railway Company* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325; *Arlington Hotel* v. *Fant, supra.*

In *Fort Leavenworth Railroad Co.* v. *Lowe, supra,* there had been an Act of Cession by the Leg-

islature of the State of Kansas, ceding exclusive jurisdiction to the United States "over and within all the territory owned by the United States, and included within the limits of the United States Military Reservation known as the Fort Leavenworth Reservation" (page 528) reserving to the State the right to serve civil or criminal processes within the Reservation, and reserving also the right to tax the railroad corporations, etc., on the Reservation. At page 539, this Court said:

> * * * whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union.

III

The provisions in the Act of Cession by the State of Nebraska in regard to the execution of process are immaterial. In *In re Ladd,* 74 Fed. 31, the United States Circuit Court for the District of Nebraska held that a State liquor law did not apply on the Fort Robinson Military Reservation. The court said (pp. 37–39):

> It being the fact, as already stated, that when Nebraska became a state no reservation of exclusive jurisdiction in the United States over the land forming the Ft. Robinson military reservation was made, it follows, from the principles announced by the supreme court in the cases just cited, that the reservation passed under the general legislative control of the state, subject, however, to the restriction that the state could not in-

terfere with the proper use of the reservation by the United States for military purposes. This continued to be the situation until the passage of the act of the state legislature approved March 29, 1887, and already quoted at length. The first section of this act expressly enacts "that the jurisdiction of the state of Nebraska in and over the military reservations, known as Fort Robinson and Fort Niobrara, be and the same are hereby ceded to the United States." In other words, all the jurisdiction with which the state was clothed, at the time of its creation and admission into the Union, over the reservations named, was in turn ceded to the United States, subject, however, to three conditions: First, that the cession of jurisdiction should continue only so long as the United States shall own and occupy the military reservations named; second, that during the time the cession of jurisdiction should continue in force the state should have the right, within the boundaries of the reservation, to serve all civil process, and to execute all criminal or other process issued under the laws of the state against persons charged with crime or misdemeanor committed within the state; and third, that public roads and highways might be opened and kept in repair within such reservations. In the act of the legislature of the state of Kansas ceding jurisdiction over the Ft. Leavenworth reservation, the proviso in regard to the service of criminal process, in terms, applied only to crimes committed outside the

reservation; but the reasoning employed by the supreme court in passing upon the general questions in *Railroad Co.* v. *Lowe, supra,* tends strongly to support the view that this restriction in the Nebraska act is merely a saving of the right to serve or execute process within the reservation for crimes committed outside the reservation, or, in other words, it was thereby intended to prevent the reservation from becoming a place of refuge for persons charged with violation of the laws of the state. The reservation of concurrent jurisdiction found in the second section of the act of March 29, 1887, in terms applied only to the matter of service or execution of process, and there is no ground for extending its meaning beyond the fair import of the language found therein. The section does not provide that the state of Nebraska retains jurisdiction over acts done upon the reservation; nor does it provide that the laws of the state shall continue in force upon the reservation; nor does it provide that the courts of the state shall continue to have jurisdiction over the reservation, or over crimes committed thereon. * * * When this grant of exclusive jurisdiction to the United States took effect, the laws of the state ceased to be operative within the reservation, except so far as the United States should choose to enforce them, and the courts of the state ceased to have jurisdiction over crimes committed within the reservation.

* * * * *

> * * * This completed and accepted contract could not be afterwards abrogated or modified by the legislature of the state, as was attempted to be done by the adoption of the so-called amendatory act of March, 1889.

Similar provisions in Acts of Cession in regard to the service of process have been similarly construed by this Court. *Fort Leavenworth Railroad Co.* v. *Lowe,* 114 U. S. 525, 533, *supra; Benson* v. *United States,* 146 U. S. 325, *supra.*

IV

So under the Act of Cession by the State of Nebraska in 1887 (pp. 3–4, *supra*) the only qualification applicable here is the following:

> *Provided,* That the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy said military reservations.

It is plain that such proviso is prospective in its application, and that it, therefore, has no proper place in determining whether the land covered by the railroad right of way in question was, *at the time of the cession,* a part of, and included within, the Fort Robinson Military Reservation.

It results, therefore, that the crucial question to be here determined is whether or not the Act of January 20, 1885 (23 Stat. 284), which granted the right of way here in question, had the effect of removing the land included in such right of way

from the lands which formed, and continued to form, the Fort Robinson Military Reservation.

V

Ordinarily the grant of a right of way does not convey absolute title. *New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 183; *Northern Pacific Ry.* v. *Townsend*, 190 U. S. 267, 271; *United States* v. *Michigan*, 190 U. S. 379, 398; *Western Union Tel. Co.* v *Pennsylvania R. R.*, 195 U. S. 540, 570; *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47; *Kern River Co.* v. *United States*, 257 U. S. 147, 152.

No sovereign power which the community has an interest in preserving, undiminished, will be held to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. *Providence Bank* v. *Billings*, 4 Pet. 514; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Ohio Life Insurance and Trust Co.* v. *Debolt*, 16 How. 416, 432; *Brown* v. *Duchesne*, 19 How. 183, 195; *Wright* v. *Nagle*, 101 U. S. 791, 796; *Wheeling etc. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287, 292; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, 628.

As the court said in *Robbins* v. *United States*, 284 Fed. 39, 45 (C. C. A. 8th):

> Neither grants of rights of way on the public lands, accepted by user or statute, nor state ownership of highways derived from the government or otherwise effect any abdication of such constitutional authority.

It would, therefore, we think, be presumed that Congress did not intend to convey a fee simple title to the right of way, or to relinquish its control over the right of way, in the absence of words specifically so indicating.

The Government further contends that, in view of the language of the Act requiring the location of the right of way "to be subject to the approval of the Secretary of War," this grant of the right of way should *not* be construed to eliminate the right of way strip from the Military Reservation, and moreover that the very grant of the right of way itself was presumably made to aid and facilitate the operation of the Military Reservation through the transportation access afforded by the proposed railroad. Nothing either in the record or in the legislation indicates that the reservation had railroad communications prior to the granting of this right of way. It may well have been that the service of a railroad to that post over the right of way in question was of the highest importance from a military standpoint, and that therefore the grant of the right of way in question, subject, as it was, to the approval of the Secretary of War, was predicated on the desire of the Government to afford transportation access to the Reservation. The subsequent approval of the location of the right of way by the Secretary of War would be a further indication that the right of way was placed where, in the opinion of the Secretary of War, it would best serve the military purposes for the ob-

tainment of which the right of way was authorized by Congress.[1] The fact that ultimate railroad purposes on the part of the railway company might have embraced other localities than Fort Robinson, and contemplated the extension of services to other prospective patrons outside of and not connected with the Military Reservation, would not negative the presumed moving intent of the United States to have such proposed line of railway serve the military purposes of the United States in the operation of the Military Reservation.

It would, therefore, appear that the grant of this railway right of way was not intended to remove the land from the Military Reservation.

VI

The contention of the Government, as presented in the preceding paragraph, is supported by the contemporaneous administration of the Military Reservation by the military authorities, as well as by the attitude taken toward the right of way by the authorities of the State of Nebraska.

The Supreme Court of Nebraska, in the case of *Anderson* v. *Chicago & Northwestern Railway Co.*,

---

[1] *As a matter of fact, there was no railroad on or immediately adjacent to the Reservation prior to the granting of the right of way in question. The right of way here involved runs diagonally across the Reservation and is approximately five miles in length, and the military post itself is located at approximately the medial point of the right of way as it crosses the Reservation.*

102 Neb. 578, 581, 584, in considering the application of a State law requiring railway companies to fence their tracks, refers to orders made by the Secretary of War forbidding such fencing of this particular right of way, upon the ground that such fencing would interfere with the military operations necessary on the Reservation, the order stating that "the entire reservation is used for instruction and maneuver purposes * * * and, if fenced in as proposed by the railway company, it will greatly interfere with the use of the land for maneuver and drill purposes." The Supreme Court of Nebraska, therefore, concluded that the control of the United States over the question of fencing of this right of way was conclusive because "the War Department has decided that the fencing of the right of way would impair the effectiveness of the territory for the purpose for which the cession was made."

It, therefore, appears that both the United States, acting through the War Department, and the State of Nebraska, under the decision of its highest court, viewed the right of way as under the exclusive control of the United States, and their action presents an interpretation and construction of the meaning of the Act of 1885, creating the right of way, which is entitled to weight. In *State of Wisconsin* v. *State of Illinois*, 278 U. S. 367, 413, this Court said:

> This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Noth-

> ing is more convincing in interpretation of a doubtful or ambiguous statute. *United States* v. *Minnesota,* 270 U. S. 181, 205; *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322, 331; *Kern River Co.* v. *United States,* 257 U. S. 147, 154; *United States* v. *Burlington & Missouri River R. R.,* 98 U. S. 334, 341; *United States* v. *Hammers,* 221 U. S. 220, 228; *Logan* v. *Davis,* 233 U. S. 613, 627.

And in *United States* v. *Hill,* 120 U. S. 169, 182, this Court said:

> In *Edwards' Lessee* v. *Darby,* 12 Wheat. 206, 210, it was said: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." To the same effect are *United States* v. *Dickson,* 15 Pet. 141, 145; *United States* v. *Gilmore,* 8 Wall. 330; *Smythe* v. *Fiske,* 23 Wall. 374, 382; *United States* v. *Moore,* 95 U. S. 760, 763; *United States* v. *Pugh,* 99 U. S. 265, 269; *Hahn* v. *United States,* 107 U. S. 402, 406; and *Five per cent Cases,* 110 U. S. 471, 485.

There is attached hereto as an appendix a copy of an opinion rendered by the Judge Advocate General of the Army to the Secretary of War under date of July 10, 1890, upon the extent of the jurisdiction of the United States over land set aside at the Military Academy for the use of the West Shore

Railroad Company under Act of Congress, approved December, 1867, 15 Stat. 33, quoted in that opinion. By that Act Congress gave "consent" to that company to locate and operate its railroad "across the property belonging to the government at West Point." The Judge Advocate General decided that the jurisdiction of the United States over the land owned by it and occupied by the railroad under authority of Congress, had not been ousted by such occupancy.

The Court of Appeals of New York, in *People* v. *Hillman,* 246 N. Y. 467, held that the Act by which the State ceded land to the United States for the West Point Military Academy Reservation, ceded jurisdiction to the United States over crimes committed on a portion of the land embraced in the Reservation, reserved by the State for highway purposes. The court, therefore, held that the State had no jurisdiction over a crime committed upon a strip of land used as a highway, and pointed out that even though the State reserved a right of occupancy of highways then or thereafter existing across the Reservation, it did not extend State political dominion and authority over such highways, and such right of occupancy on the part of the State did not impair the complete political dominion over the entire Reservation, including the highways, which had been ceded to the United States.

The Court of Criminal Appeals of Texas, in the case of *Baker* v. *State,* 47 Texas Crim. Rep. 482, held, with reference to the jurisdiction of the United States over a portion of the Fort Brown Military Reservation, that the fact that the Government had permitted a part of the ceded Reservation to be used as a street would not oust the United States of jurisdiction of offenses committed on such street.

VII

The rule followed by the court below would result in great inconvenience, and render the due enforcement of law impracticable if not impossible.

If the Act granting the right of way can be regarded as ambiguous, resort should be had to the principle that the courts will give that construction to an ambiguous statute which best comports with the principles of reason, justice, and convenience. *Knowlton* v. *Moore,* 178 U. S. 41, 77, and cases cited; *Tait* v. *Commercial Credit Co.* (C. C. A., 4th), 7 F. (2d) 1022, affg. *Commercial Credit Co.* v. *Tait,* 2 F. (2d) 862; *Missouri Pacific R. Co.* v. *Holt* (C. C. A., 8th), 293 Fed. 155, 162, certiorari denied, 264 U. S. 584; *Stockyards Loan Co.* v. *Nichols* (C. C. A., 8th), 243 Fed. 511, 516; *In re Halsey Electric Generator Co.,* 175 Fed. 825, 832, decree affirmed, *State of New Jersey* v. *Lovell* (C. C. A., 3d), 179 Fed. 321, certiorari denied, 219 U. S. 587.

If the rule followed by the lower court is to be maintained, it seems that the State of Nebraska

must police a strip of land one hundred feet wide through the Reservation.

There are also other possible rights of way through this reservation to be considered. By Section 18, Act of March 3, 1891, c. 561, 26 Stat. 1095, 1101 (U. S. C. Title 43, Sec. 946), a right of way was granted by Congress through all the public lands and reservations of the United States to any canal or ditch company formed for the purpose of irrigation. Such right of way extends to "the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof." By the Act of August 14, 1911, c. 11, 37 Stat. 16, Congress granted to the City of Crawford, Nebraska, a right of way across this Reservation to construct and maintain a pipe line for the water supply of that city. Revocable licenses have been granted, presumably by the War Department, in 1889 to the Crawford Fair Association for a fair ground; in 1900, to the Fremont, Elk Horn and Missouri Valley Railway Company for stockyard purposes; in 1903, to the Village of Crawford for a dam, pumping station, raceway, etc.; and other such licenses at later dates for telephone lines and systems. If it should be held that every such grant or license carries an implied recession of jurisdiction to the State, the question of jurisdiction over offenses committed on this or any other Government Reservation will become one of unending difficulty.

VIII

The contention urged by the Government here is in harmony with the controlling decisions of this Court.

In *Fort Leavenworth Railway Co.* v. *Lowe,* 114 U. S. 525, *supra,* the Act of Cession on the part of the State of Kansas specifically reserved the right to tax railroad corporations on a Reservation. Therefore, since the Act of Cession created the convention and agreement between the United States and Kansas, the Court held that taxes imposed by the State of Kansas upon the Railway Company on a Military Reservation might properly be laid.

In *Chicago & Pacific Railway Co.* v. *McGlinn,* 114 U. S. 542, *supra,* wherein the Railway Company was sued for damages because of the killing of livestock upon the railway line on a Military Reservation, this Court held that such recovery might be had in accordance with the provisions of a Kansas statute, not because the State of Kansas, as a State had jurisdiction over the railroad right of way, but because it would be presumed that the *laws* of Kansas, intended for the protection of private rights, continued in force after cession of jurisdiction to the United States, if unabrogated or changed by the United States.

In *Benson* v. *United States,* 146 U. S. 325, *supra,* the plaintiff in error was indicted for a murder alleged to have been committed on the Fort Leavenworth Military Reservation. It was contended

that the alleged crime was not within the jurisdiction of the United States, it having been committed in a part of the Reservation which was used solely for farming. As to that this Court said (p. 331):

> It is contended by appellant's counsel that, within the scope of those decisions, jurisdiction passed to the general government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the government. The entire tract had been legally reserved for military purposes. *United States* v. *Stone,* 2 Wall. 525, 537. The character and purposes of its occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put.

In *Arlington Hotel* v. *Fant,* 278 U. S. 451, 453, 454, it appears that counsel for the plaintiffs insisted that the United States Government may treat land ceded to it by a State for the purposes of making a national park, exactly as it would treat it had it always been within its exclusive jurisdiction and subject to its disposition for park purposes. This Court did not find it necessary at that time to examine that question; but, on "the prin-

ciple of the *Lowe* case and other cases already cited," it did decide that this hotel, standing within the Reservation and within the territory ceded by the State, built long before the Act of Cession, a hotel owned by the United States Government, but leased by it to private parties, which had been operated for more than fifty years under a lease from the United States, was within the exclusive jurisdiction of the United States.

In the *Fant case* the manner of acquisition of the lands was like that in the case at bar; that is, the territory included in the cession was not purchased by the consent of the State, but was reserved by the Government out of public lands, with exclusive jurisdiction afterward acquired by formal cession. The Court seems to hold (p. 455) that such a situation comes within the scope of Clause 17, Section 8, Article I of the Constitution, providing for exclusive jurisdiction of the United States "over all places purchased by the consent of the legislature of the State." It would, therefore, seem that no distinction should be made, under the constitutional provision, between (a) lands purchased with the consent of the State, and (b) lands reserved from the public domain, jurisdiction whereof is afterward ceded.

The decision in the *Fant case* seems particularly applicable to the case at bar, inasmuch as in the *Fant case* a hotel property operated by private parties for the use, in part at least, of private individuals, was held, notwithstanding those facts, to

be a part of the Reservation, and within the exclusive jurisdiction of the United States, precisely as the Government here maintains that a railway right of way, in part for private use and under private control, remains still a part of the Military Reservation under the exclusive jurisdiction of the United States.

IX

The Government further contends that the decisions relied on by the court below are not applicable here.

In *Clairmont* v. *United States,* 225 U. S. 551, this Court held that the offense of introducing liquor into "the Indian country" was not committed by bringing liquor merely in a train on to land on the right of way of a railroad through the Flathead Reservation in Montana. But the prosecution admitted that the usual test of "Indian country" was whether the Indian titles had been extinguished, and that in fact such titles had been extinguished over the right of way. So the right of way involved could not possibly be held to be "Indian country," and the Court pointed out (p. 560) that there was no "provision, either in the treaty with the Indians, or by act of Congress, which limited the effect of the surrender of the Indian title."

In *Utah & Northern Railway* v. *Fisher,* 116 U. S. 28, the right of the Territory of Idaho to tax a railway running across an Indian Reservation was

considered. The railroad contended that the Indian Reservation involved was excluded from the limits of the Territory of Idaho under the congressional Act creating the Territory, and also that the Treaty of July 3, 1868, between the Indians and the United States, necessarily excepted the Reservation from the jurisdiction of the Territory. The Court held that as no treaty existed with the Indians at the time Congress created the Territory, a proviso in a subsequent treaty with the Indians could not have the effect of withdrawing the Reservation from the limits of the Territory. It further appeared that the Indians had ceded their title to the strip of land involved in the right of way to the United States for a consideration of $6,000. This cession necessarily removed the strip from the Indian Reservation and placed the title to the strip wholly in the United States, and thereafter when the United States granted the railroad company a right of way, such right of way could be no part of the Indian Reservation since it had been taken out of the Indian Reservation by the express cession to the United States on the part of the Indians themselves. For that reason, the contention that the railroad could not be taxed by the Territory because it was a part of the Indian Reservation became untenable, and the Court further indicated that the taxation of the railroad owning the right of way would not interfere with the treaty stipulations for the benefit of the Indians, and that as the Indians could be fully protected under such treaty

stipulations, no reason appeared why the railroad company might not be taxed to the same extent as any other railroad company. The question of the jurisdiction of the United States was not involved. Although the United States did temporarily have a property right in the strip in question, there was no ground for contending that it had sovereign rights in respect to the strip.

We submit that the trial court in the instant case fell into error in relying upon the following language of the Court in the *Fisher case* (R. 9):

> By force of the cession thus made, the land upon which the railroad and other property of the railroad are situated was * * * withdrawn from the Reservation.

The trial court, as shown by its interpolation, "that is, the Acts of Congress granting right of way for the construction and operation of the railroad," failed to appreciate that the *cession* referred to in this Court's opinion refers to the whole course of proceedings by which the railroad acquired its right of way, which included, of course, the agreement of the Indians relinquishing, for a cash consideration, their title to the right of way.

CONCLUSION

We therefore submit that over a crime committed upon the right of way here involved, jurisdiction was in the United States District Court for the District of Nebraska.

The judgment of the District Court should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.

O. R. LUHRING,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

W. H. RAMSEY,
Attorney.

SETH W. RICHARDSON,
Assistant Attorney General.
Of Counsel.

FEBRUARY, 1930.

APPENDIX

WAR DEPARTMENT,

Washington, D. C., July 10th, 1890.

Respectfully returned to the Secretary of War.

The Superintendent of the Military Academy raises the question of the extent of the jurisdiction of the United States over the strips of land set aside for the use of the West Shore Railroad Company under the Act of Congress approved December 14, 1867.

The Act of Congress mentioned (15 Stat. 33) reads as follows:

> That the consent of the United States is hereby given to the Hudson River and West Shore Railroad Company to locate, construct, and operate its railroad on the shore line, across the property belonging to the government at West Point, in the State of New York, upon such location and under such regulations as shall be approved by the Secretary of War.

The lands over which the railroad in question has been granted the right of way were acquired by the United States under deeds from Stephen Moore and wife dated September 10, 1790, and Oliver Gridley and wife dated May 13, 1824. Over a part of these tracts (220 acres) jurisdiction was ceded by the legislature of New York in an Act of March 2, 1826, with the proviso that such jurisdiction shall not impede or prevent the execution of process, civil or criminal, issuing under the authority of the State, except so far as such process may affect the real and personal property of the United

States and by an Act of May 15, 1875, the legislature of the State of New York gave its consent to the purchases theretofore made by the United States of the several (458) tracts of land at West Point then owned and held by the United States and ceded jurisdiction over said lands, reserving, however, the right to serve civil and criminal process as then existing, except so far as such process may affect the real and personal property of the United States, and occupancy of the highways then existing or which may exist upon said lands under the laws of the State. (Laws of New York, 1875, page 346.) Under an Act of May 25, 1876, the Legislature of New York granted to the United States certain described lands under the waters of the Hudson River between high and low water mark in front of and adjacent to, the lands of the United States, and ceded jurisdiction over the same with the proviso that the jurisdiction ceded shall continue no longer than the United States shall own said land at West Point and the adjacent land covered with water, and that all civil and criminal process as may lawfully issue under the authority of the State may be served or executed over said lands.

It is the opinion of this office that the jurisdiction of the United States over the lands owned by it and occupied by the railroad under the authority granted by Congress, has not been ousted by such occupancy and the authority of the Superintendent of the Military Academy over said lands is the same as over the remainder of the lands owned by the United States at West Point, with this exception, however, that he can not interfere with the legitimate use by this railroad of the lands occupied by it under the act of Congress above quoted.

In reference to the powers proposed to be exercised by the Superintendent of the Military Academy it is to be remarked that violations of the regulations of the Military Academy or Post of West Point by (459) civilians are not cognizable by the courts of the United States and he can not legally cause civilians to be confined in the guardhouse for such violations; his only remedy is to remove the offenders beyond the limits of the reservation. In this connection attention is invited to the opinion of Attorney General B. F. Butler dated July 13, 1837 (III Op. Attys. Genl. 268), upon the rights of residents and visitors at the Military Academy.

Arrests of civilians without warrants by a person not a civil officer may be made under the law in the following cases: 1, when a felony or any crime in violation of the public peace, is, at the time of arrest, being committed in his presence; 2, when a *felony* has actually been committed and he has probable cause for believing that the person arrested is the felon. It is the duty of the person making the arrest to disclose his official character and purpose to the accused, unless the circumstances sufficiently declare it, and to inform him, if he desires it, of the crime with which he is charged, and of the tribunal before which he is about to be conveyed. It is also his duty to *use no unnecessary violence,* and as soon as he reasonably can, to present the accused before the Court having cognizance of the offence, or to deliver him to a peace officer. (See Sec. 1014, Rev. Stat. of the U. S.; also Sec. 183, Code of Crim., Proc. of N. Y.)

G. NORMAN LIEBER,
Acting Judge Advocate General.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

NO. 503

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZEUTA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF FOR DEFENDANT

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In the Supreme Court of the United States

OCTOBER TERM, 1929

NO. 509

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRANCISCO UNZEUTA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

BRIEF FOR DEFENDANT

JURISDICTION

The jurisdiction of this court in this appeal is conceded.

The exclusive jurisdiction of the crime charged in the courts of the United States is questioned.

QUESTION PRESENTED

Did not Congress by the Act of January 20, 1885, confer upon the Fremont, Elkhorn & Missouri Valley Rail Road Company, a Nebraska corporation, easement so that the railroad operations on such easement are under the control of the State of Nebraska as a post road, and that crimes committed upon the trains of said Nebraska corporation are within the jurisdiction of the State of Nebraska concurrent with a jurisdiction claimed by the United States?

CONSTITUTION INVOLVED

Article I, Sec. 8 Clause 7, Constitution of the United States (U. S. C. A.) Page 401 reads:

"The Congress shall have power ***** to establish post-offices and post roads;"

STATUTES INVOLVED

"U. S. C. A., Title 39, Chapter 14, Section 481," the following are post roads:

All railroads "or parts of railroads which are now or hereafter may be in operation * * . The road on which the mail is carried to supply any court-house that may be without a mail,"

This section was derived from Act June 8, 1872, c. 335, Sec. 200-205, 17 Stat. L. 309.

Section 482:

"All public roads and highways, while kept up and maintained as such, are post roads."

STATEMENT

The indictment charges that the homicide on July 24, 1929, took place upon a freight car in a freight train moving on the right-of-way of the Chicago & North Western Railway Company. By Act of January 20, 1885, cited in the brief of the Government at page 5, Congress granted this right-of-way to the Fremont, Elkhorn & Missouri Valley Rail Road Company, which was and is a corporation of the State of Nebraska.

SUMMARY OF ARGUMENT

1. The Act of Congress granting a right of way to a Nebraska corporation did affect the control of the United States over the land embraced in the right of way to the extent that it was used and adapted to be used for transportation of railroad trains engaged in interstate and intra-state commerce.

2. The control by the State of Nebraska over the operations of the trains of its corporation over this easement of way was and is exclusive and may not be arrested by the representative of the War Department

except, alone in the exercise of vis major for the transportation of the armies and armies' supplies in extraordinary circumstances.

3. The constant exercise by the State of Nebraska of control over the operations of its corporation constantly from its incorporation ----------, which control was recognized by the trial court and was known to the Congress at the enactment of the statute quoted, Act of January 20, 1885, shows the State of Nebraska had and has concurrent, if not exclusive, control over this post road.

ARGUMENT

> "The post roads of the United States are the property of the states through which they pass; they may temporarily part with the possession of them by charter, and the grantees, while the charter continues, have the right to preserve such roads."

In Cleveland etc. R. Co. v. Franklin Canal Co., the Circuit Court of Pennysvlvania in 1853 held, 5 Fed. Cas. No. 2890:

> "That the power given by the constitution to establish post roads means such roads as are regularly laid out by the authority of the states,"

The government of the United States cannot construct a post road within a state of this union without its consent; but Congress may declare such a road already opened and made public highway by the direct or indirect authority of the State. The same case also holds an Act of Congress making all such railroads post roads means only such as have charters from the state.

It has also been held in Atlantic etc. Tel. Co. v. Chicago etc. R. Co. by Bissell in (Circuit Court of Illinois 1874) 2 Fed. Cas. 632, that by the declaration that rail-

roads are post roads was meant only that mails can be transported over railroads as over ordinary public highways. It does not follow that the United States may therefore, without the consent of the railroad companies, transport the mails over them. This is a positive determination that the corporation of the state and the state control thereof are beyond or over the authority sought to be exercised by the War Department.

In Houston v. Moore, 5 Wheaton at page 34, the opinion of the court delivered by Mr. Justice Johnson

> "The laws of the United States have made many offences punishable in their courts which were and still continue punishable by the state *** Witness also the crime of robbing the mail on the highway, which is unquestionably cognizant as highway-robbery under the state laws, although made punishable under those of the United States."

In the opinion of Mr. Justice Washington in the same case at page 31 is said:

> "If the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, in stituted in a circuit court of the United States."

And it was the judgment of the court in this case,

> "That there is no error in the judgment of the state court of Pennsylvania,"

whose judgment determined that the conviction in the state court of Pennsylvania was by a competent court and was accordingly affirmed.

By reason of this authority there must be distinguished the effect of Anderson v. Chicago & North Western Rail Road Company, 102 Nebr. 578, which from the facts involved determined only that the Nebraska state fencing law, which fencing law is not considered enforcible within limits of villages should not be deemed enforcible in this military reservation where its enforcement would effectively interfere with the necessary uses and purposes of such reservation by the War Department. In view of the particular circumstances here consel submits that the trial court gave the proper effect here to the law as declared by you in the case of Utah & Northern Railway v. Fisher, 116 U. S. 30 (R. 9), as follows:

> "The land upon which the railroad and other property of the railroad are situated was, so far as necessary for the * * working of the road, withdrawn from the reservation. The road and the property thereupon became subject to the laws of the territory relating to railroads as if the reservation had never existed."

"In view of the argument will say that while the Act of June 8, 1872," (Section 481 quoted supra) "provides that 'and all railroads in operation are declared 'post roads', yet such fact does not deprive the state of the police power thereof," is declared by United States Circuit Court of Appeals, Ninth Circuit, in Buck v. Kuykendall, etc., 295 Fed. at page 197; 201 where is cited with approval from Comm. v. Closson, 229 Mass.; 329, L. R. A. 1918 C. 939:

> "While undoubtedly they are post roads **** yet the ways remain public ways laid out and maintained by the commonwealth, which has the exclusive power, * * to make and enforce reason-

> able regulations for their use. Nor do the facilities thereby afforded for the transportation of the mails impliedly do away with the power of supervision and control inherent in the State."

At page 15 of the brief of the United States, herein in a marginal note is said: "As a matter of fact there was no railroad on or immediately adjacent to the reservation prior to the granting of the right of way in question."

But, as a matter of fact, there has always been from prior to the date of Camp Robinson a well defined traveled highway immediately adjacent to the right of way of the Fremont, Elkhorn & Missouri Valley Rail Road traveled by pioneers, by settlers in the territory west of Nebraska, by Inidans, by government employees, freighters, and troops, which became highway of the state at its erection and which has been continued by Federal aid under the national and state legislation in that regard.

The situation shown by the record in this case comes fully within the third condition stated in re Ladd, 74 Fed. 31, quoted in the brief of the United States at page 10.

"And, third, that the public roads and highways might be opened and kept in repair within such reservations."

The charter by the State of Nebraska to the Fremont, Elkhorn & Missouri Valley Rail Road Company and the Act of Congress recognizing the same, January 20, 1885, was a full and complete acceptance and recognition by this government and the State of Nebraska and fulfillment of this condition.

Moreover, defendant, respondent to this appeal, insists that the Department of Justice has waived and

withdrawn from its contention here made.

The showing herewith filed by the County Attorney of Sioux County, Nebraska, and by the County Attorney of Dawes County, Nebraska, clearly demonstrates that the Department of Justice has abandoned its claim that the government of the United States has exclusive jurisdiction of the alleged homicide, and by the procuration of the public prosecutors to file complaints against defendant, in the name and by authority of The State of Nebraska for this alleged homicide the Department of Justice has abandoned this claim of jurisdiction; or, effectually has waived this appeal by expressing its want of confidence in the claim made in this appeal.

Surely when the United States District Attorney procured each one of these state prosecutors to arrest and hold without bail, under a complaint of the same charge, the powers of this government are being invoked in oppression of this National, who is a subject of a friendly commonwealth, which commonwealth has in an orderly way asked his rights for this unfortunate respondent.

CONCLUSION

We, therefore, submit that over an alleged crime, which consists of the unfortunate killing in self defense, upon a moving interstate train of a railroad operating under charter from the State of Nebraska, that jurisdiction was not, and is not, in the United States District Cour for the District of Nebraska. The judgment of the District Court should be affirmed and respondent, defendant, should be granted safe conduct back to his ultimate destination.

Respectfully Submitted

✓ ALLEN G. FISHER,
Attorney for Defendant.

APPENDIX

State of Nebraska, Sioux County, ss.

Albert L. Schnurr, of lawful age, being first duly sworn on oath deposes and states.

That he is t e duly elected, qualified and acting County Attorney of Sioux County, Nebraska, for a term beginning January 1927 and ending January 1931. That his office is in Harrison, Nebraska, which is situated about 500 miles west from Omaha, in said state.

Affiant further states that on or about October 1st, 1929, he called at the Federal Building, in the City of Omaha, to ascertain what disposition had been made of the case of United States against Francisco Unzueta, charged with the crime of murder, which crime consisted of the killing by shooting by said Unzueta of one Omer Robertson, while each was riding upon a freight car in a train of the Chicago & North Western Railway Company, on its right of way across Fort Robinson Military Reservation, the said train then moving from Chadron, Nebraska, to Casper, Wyoming, on July 24th, 1929. Affiant was informed that the presiding Judge Honorable J. W. Woodrough, had not as yet passed upon the objections of counsel for the defendant, as to the jurisdiction of the Federal Court, the United States attorney contending that the United States Court had exclusive jurisdiction upon the Military Reservation and the right of way of the railroad company where it passed across said reservation.

Affiant further states that on or about the 19th day of October 1929, he received a copy of the decision of Judge Woodrough and of the order made in said case, wherein it was held that the Federal Court was without jurisdiction to hear said cause. That at about that date he had a conversation with one of the Deputy United

States Attorneys at Omaha, who suggested that a complaint be filed in the State Court, affiant having heretofore informed the United States Attorney that he expected to do so, should the Federal Court be without jurisdiction.

Affiant further states that he then believed that the place where the body of said Omer Robertson was found within said Military Reservation on the right of way of said railroad was within the territorial limits of the County of Sioux, and State of Nebraska, he having been so advised by several persons residing nearby who were presumed to know the boundary lines between Sioux and Dawes County.

Affiant further states that as County Attorney of said Sioux County, he prepared and filed on October 19th, 1929, a complaint in the County Court of Sioux County, Nebraska, which Court is that of an examining and committing magistrate with jurisdiction to issue warrant and hold preliminary examinations upon charges of felonies against the State of Nebraska, and a warrant of arrest was issued under the seal of said Court, and upon the 3rd day of December 1929, the said Francisco Unzueta arrested at Chadron, Nebraska, by the Sheriff of Sioux County, Nebraska, and held to answer such charge in the Court of said Sioux County, for the crime described against the State of Nebraska, and which prosecution was wholly in disregard of the jurisdiction of the United States of America.

Affiant further states that on or about January 6th, 1930, he satisfied himself that the body of Omer Robertson, had been found within the territorial limits of Dawes County, Nebraska, and that the crime must have been committed in said Dawes County, and he thereupon caused a dismissal of said complaint to be filed in

the County Court of Sioux County, Nebraska, where said matter was still pending.

A. L. SCHNURR.

Subscribed in my presence and sworn to before me this 13th day of January 1930.

(Seal) W. E. Mumby, Notary Public.

The State of Nebraska, Dawes County, ss.

Frederick A. Crites, being first duly sworn according to law, deposes: he is the duly elected, qualified and acting County Attorney of said county for a term beginning January, 1927, and ending January 1931.

That his office is in Chadron in said county, which is situated 437 miles west from the City of Omaha in said State, wherein is the office of Honorable James C. Kinsler, District Attorney of the United States of America for said District of Nebraska.

That on January 6, 1930, the office of said Honorable James C. Kinsler at Omaha called affiant upon long distance telephone and requested this affiant, as County Attorney, to file in the County of Dawes aforesaid a complaint and prosecution upon the charge of murder in the first degree against Francisco Unzueta, who is now in the county jail at Harrison in Sioux County, Nebraska, held upon the same charge, and which charge against said Francisco Unzueta charges that on July 23, 1929, upon a freight car of the Chicago & North Western Company ,in a train of said company, then and there moving in interstate commerce across Fort Robinson Military Reservation, (which is a fort of the United States claimed by the said United States Government and its District Attorney to be within the exclusive jurisdiction of the United States and its courts) the said

Francisco Unzueta, with premeditated malice, did murder one Omer Robertson.

Affiant states that he went with surveyor or engineer on said January 6, 1930, to the point on said right-of-way of Chicago & North Western Railway Company where the dead body of said Omer Robertson had been found on July 23, 1929, in the night time, and the survey of said Reservation and right-of-way and plats thereof convinced this affiant that the point of death and of the shooting which caused the death of said Omer Robertson was truly within the geographical boundaries of the said County of Dawes, Nebraska, although within the territorial limits of said Fort Robinson Military Reservation.

Affiant states that he has filed before the County Court of his said county, which is a court with jurisdiction as committing magistrate, a complaint, now charging that such acts, alleged to be the doing of said Francisco Unzueta, are contrary to the laws of the State of Nebraska, as murder in the first degree, and against the peace and dignity of the People of the State of Nebraska. And affiant has caused to be issued upon such complaint a warrant under the seal of said court, whereunder the sheriff of said county will remove the person of Francisco Unzueta into the jail of this county, and proceed in due course with this prosecution of said defendant, which prosecution is and will be in entire disregard of the claim of jurisdiction of the United States that is prosecuting said Francisco Unzueta upon the identical same charge and an indictment of the United States therefor.

And further affiant says not.

FREDERICK A. CRITES.

Subscribed in my presence and sworn to before me

this 8th day of January, 1930.

(Seal) Charles A. Fisher

Notary Public in and for said county. My notarial commission expires 5-24-35.

The State of Nebraska, Dawes County, ss.

To the sheriff or constable of said county, greetings:

WHEREAS, before me James H. Stewart, County Judge within and for said County of Dawes complaint has been made in writing, signed and sworn to by Frederick A. Crites, County Attorney, and filed according to law, that Francisco Unzueta of said county, on or about the 24th day of July A. D. 1929, in the County of Dawes, in said State of Nebraska then and there being, did then and there feloniously, purposely, and of his deliberate and premeditated malice, shoot one Omer Robertson with a revolver and as a result thereof the said Omer Robertson died July 24th, 1929. Defendant thus committed murder in the first degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska,

These are, therefore, to command you forthwith to take the said Francisco Unzueta if he be found in your county; or if he shall have fled, that you pursue after the said Francisco Unzueta into any other county within the state, and take and safely keep the said Francisco Unzueta so that you bring his body forthwith before me or some other magistrate having cognizance of the case of said offense so committed, to answer said complaint and be further dealt with according to law.

Given under my hand and seal this 7th day of January A. D., 1930.

JAMES H. STEWART,

(Seal) County Judge.

The State of Nebraska vs. Francisco Unzueta, Defendant.
Office of County Judge, Filed January 9, 1930.

James H. Stewart, County Judge.

State of Nebraska, Dawes County, ss.

Received this warrant Jan. 7th, 1930, and pursuant to the command thereof I have arrested the within named Francisco Unzueta and now have his body before the Court.

Dated this 8th day of January, 1930.

VET CANFIELD,
Sheriff of Dawes County.

SUPREME COURT OF THE UNITED STATES.

No. 509.—October Term, 1929.

The United States of America, Appellant, *vs.* Francisco Unzeuta.	Appeal from the District Court of the United States for the District of Nebraska.

[April 14, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The respondent was indicted for murder alleged to have been committed on a freight car on the right of way of the Chicago & Northwestern Railway Company on the Fort Robinson Military Reservation in Nebraska. He filed a plea to the jurisdiction of the United States upon the ground that the right of way was within the jurisdiction of the State of Nebraska. The District Court sustained the plea (35 F. (2d) 750) and the Government brings the case here under the Criminal Appeals Act (34 Stat. 1246, U. S. C., Tit. 18, sec. 682).

When Nebraska was admitted to the Union, the United States retained all right and title to the unappropriated public lands lying within the territory of Nebraska. Act of April 19, 1864, c. 59, sec. 4, 13 Stat. 47, 48; Act of February 9, 1867, c. 36, sec. 2, 14 Stat. 391, 392. By Executive Order of November 14, 1876, a portion of these lands was reserved for the Fort Robinson Military Reservation. In 1885, Congress granted the right of way in question to the Fremont, Elk Horn & Missouri Valley Railroad Company, a Nebraska corporation, "across and through the Fort Robinson Military Reservation, located in said State of Nebraska, not to interfere with any buildings or improvements thereon, and the location thereof to be subject to the approval of the Secretary of War". Act of January 20, 1885, c. 26, 23 Stat. 284. In 1887, Nebraska ceded to the United States "the jurisdiction of the State of Nebraska in and over the military reservations known as Fort Niobrara and Fort Robinson" on the following conditions (Laws of Nebraska, 1887, p. 628):

"*Provided,* That the jurisdiction hereby ceded shall continue no longer than the United States shall own and occupy such military reservations.

"Sec. 2. The said jurisdiction is ceded upon the express condition that the State of Nebraska shall retain concurrent jurisdiction with the United States in and over the said military reservations so far as that all civil process in all cases, and such criminal or other process may issue under the laws or authority of the state of Nebraska against any person or persons charged with crime or misdemeanors committed within said state, may be executed therein in the same way and manner as if such jurisdiction had not been ceded except so far as such process may affect the real and personal property of the United States;

"*Provided,* That nothing in the foregoing act shall be construed so as to prevent the opening and keeping in repair public roads and highways across and over said reservations."

When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated "for the erection of forts, magazines, arsenals, dockyards and other needful buildings", (Const. Art. I, sec. 8) the Federal jurisdiction is exclusive of all State authority. With reference to land otherwise acquired, this Court said in *Fort Leavenworth Railroad Company* v. *Lowe,* 114 U. S. 525, 539, 541, that a different rule applies, that is, that the land and the buildings erected thereon for the uses of the national government will be free from any such interference and jurisdiction of the State as would impair their effective use for the purposes for which the property was acquired. When, in such cases, a State cedes jurisdiction to the United States, the State may impose conditions which are not inconsistent with the carrying out of the purpose of the acquisition. *Fort Leavenworth Railroad Company* v. *Lowe, supra; Chicago, Rock Island & Pacific Railway Company* v. *McGlinn,* 114 U. S. 542; *Benson* v. *United States,* 146 U. S. 325, 330; *Palmer* v. *Barrett,* 162 U. S. 399, 403; *Arlington Hotel Company* v. *Fant,* 278 U. S. 439, 451. The terms of the cession, to the extent that they may lawfully be prescribed, determine the extent of the Federal jurisdiction.

In the present instance, there is no question of the status of the Fort Robinson Military Reservation. Nebraska ceded to the United States its entire jurisdiction over the reservation save in the matter of executing process and opening and repairing roads or highways. It was in this view that the Federal Circuit Court decided

that, after this jurisdiction had been accepted by the United States, it could not be recaptured by the action of the State alone, and hence that an act of the legislature of Nebraska, passed in 1889, seeking to amend the act of cession was not effective, and that the statutes of the State regulating the sale of liquors were not in force within the ceded territory. *In re Ladd,* 74 Fed. 31. The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside, that is, to prevent the reservation from being a sanctuary for fugitive offenders.

Accepting this construction of the conditions attached to the cession, we come to the question whether the jurisdiction over the reservation covered the right of way which Congress had granted to the railroad company. There was no express exception of jurisdiction over this right of way, and it can not be said that there was any necessary implication creating such an exception. The proviso that the jurisdiction ceded should continue no longer than the United States shall own and occupy the reservation had reference to the future and cannot be regarded as limiting the cession of the entire reservation as it was known and described. As the right of way to be located with the approval of the Secretary of War ran across the reservation, it would appear to be impracticable for the State to attempt to police it, and the Federal jurisdiction may be considered to be essential to the appropriate enjoyment of the reservation for the purposes to which it was devoted. There is no adequate ground for cutting down the grant by construction.

In 1911, a controversy arose with respect to fencing the right of way. The Secretary of War forbade the fencing and, in his communication to the railway company, said: "The State, by Act of March 29, 1887, ceded exclusive jurisdiction over this reservation, subject to the usual reservations for service of process, and no statute of the State requiring railways to fence their rights of way can be regarded as operative within the reservation of Fort Robinson. Your right of way across the reservation divides it into two nearly equal parts. To place fences thereon would very greatly restrict the use of the reservation for drill and maneuver purposes, and, even though you should put in numerous passage-ways, would cause great inconvenience to the troops there stationed. . . . By

reason of the foregoing considerations, I am constrained to inform you that the Government will not permit the erection of fences along the right of way of your company within the Fort Robinson military reservation, and you are hereby notified to remove all such fences heretofore erected by your company." The Supreme Court of Nebraska in the case of *Anderson* v. *Chicago & Northwestern Railway Company,* 102 Neb. 578, held that this refusal of the Secretary of War to permit the erection of fences along the right of way constituted a defense to an action against the railway company for the killing of cattle, although a statute of the State, if it had governed the case, would have made the company liable because of the failure to enclose its tracks.

The mere fact that the portion of the reservation in question is actually used as a railroad right of way is not controlling on the question of jurisdiction. Rights of way for various purposes, such as for railroads, ditches, pipe lines, telegraph and telephone lines across Federal reservations, may be entirely compatible with exclusive jurisdiction ceded to the United States. In *Benson* v. *United States, supra,* the jurisdiction of the Federal Court was sustained with respect to an indictment for murder committed on a portion of the Fort Leavenworth Military Reservation in Kansas which was used for farming purposes. In *Arlington Hotel Company* v. *Fant, supra,* the jurisdiction of the United States was upheld as to the portion of the reservation there in question which had been leased for use as a hotel. While the grant of the right of way to the railroad company contemplated a permanent use, this does not alter the fact that the maintenance of the jurisdiction of the United States over the right of way, as being within the reservation, might be necessary in order to secure the benefits intended to be derived from the reservation.

We do not consider the decisions cited by the District Court as requiring a different view. In the case of *Utah & Northern Railway* v. *Fisher,* 116 U. S. 28, there was involved the right of the Territory of Idaho to tax the land and other property of the railroad which the company contended were within an Indian reservation and therefore not taxable. The company argued that the Indian reservation was excluded from the limits of the Territory by the Act of Congress creating the Territory and also by a treaty with the Indians. The Court held that neither position could be sustained. It appeared that no treaty with the Indians was in

existence at the time Congress created the Territory. The subsequent treaty did not require that the reservation should be excluded from the jurisdiction of the Territory when the exercise of that jurisdiction would not defeat the stipulations of the treaty for the protection of the Indians, and the Court found that the just rights of the Indians would not be impaired by the taxation of the railroad property. It also appeared that the Indians for a pecuniary consideration had ceded to the United States their title to so much of the reservation as might be needed for the uses of the railroad and that this strip of land was relinquished by Congress to the company. The Court decided that in these circumstances and by force of the cession the land was withdrawn from the reservation. In *Clairmont* v. *United States*, 225 U. S. 551, the Court held that one who had liquor in his possession on a railroad train running on a right of way through the Flathead Indian Reservation in Montana was not guilty of the offense of introducing liquor into the "Indian country". By agreement between the Indians and the United States, the Indians had surrendered all their "right, title and interest", the land had been freed from the Indian right of occupancy, and the Indian title had thus been entirely extinguished. The land could not be considered "Indian country".

We conclude that the District Court erred in sustaining the plea.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.